Index of Subject Matter

PAGES

Point 1: Petitioner (defendant) did *not* object to twice-requested revision of the forms of the verdicts (as erroneously suggested by respondent) but, in effect, joined in the request..... 1 to 5

Point 2: Contrary to respondent's brief, the jury's verdicts

a) *were* silent in respect to charge of misbranding by making false and misleading representations in the "labeling" (i.e. in the letters) as charged in Counts I & III of the Information, and

b) *did* find petitioner guilty of an offense not charged, namely, the jury's verdicts found petitioner guilty of such "misbranding" in the "label" and such "misbranding" in the "label" was *not* charged in any Count of the Information..... 5 & 6

Point 3: The misleading affidavit by the Government's attorney, filed with the Government's Petition for Re-Hearing in the Court of Appeals, as to facts *dehors* the record and contrary to the record, must be presumed to have influenced the Court of Appeals to change its judgment from "discharge the accused" to "grant a new trial", in the absence of any statement to the contrary by the Court of Appeals..... 6 & 7

Point 4: Authorities relied upon in respondent's brief in opposition to the Petition for Writ of Certiorari, do *not* support respondent's contentions advanced in opposition to the Petition..... 7

Point 4-a: Special verdicts *not* permissible in criminal cases (and the Court of Appeals correctly held that special verdicts are *not* permissible in criminal cases)..... 7 & 8

Point 4-b: *Haupt* v. *U. S.* and *Cramer* v. *U. S.*, relied upon by respondent, support petitioner's position, on the petition at bar... 8 to 10

Point 4-c: A judgment of conviction could *not* be sustained on a general verdict of "guilty", where the count charged several distinct overt acts or violations and one of such acts or violations is not established..... 10

Point 4-d: Constitutional protection against being twice put in jeopardy is *not* waived by defendant's appeal solely for acquittal or discharge (from a judgment of conviction and from the trial court's decision denying defendant's sole post-verdict motion for judgment of acquittal)..... 11 to 14

Point 5: Respondent's opposition to the granting of the Petition for Writ of Certiorari (a) is based upon respondent's reliance upon the overruled and reversed decision (R.pp. 372-380) of the District Court which denied defendant's sole post-verdict motion (R.pp. 364-369) for judgment of acquittal, and (b) is further based upon respondent's disagreement with and criticism of every conclusion of law reached by the Court of Appeals in its reversing decision (R.pp. 448-460)..... 14 to 16

Table of Cases.

	PAGES
Anderson v. *United States* (275 F. 677; CA-7)	8
Ball v. *United States* (163 U.S. 662, 672)	11, 12
Cramer v. *United States* (326 U.S. 1, 36)	8, 9, 10
Dealy v. *United States* (152 U.S. 539, 542)	9
Haupt v. *United States* (330 U.S. 631, 641)	8, 9, 10
Louisiana ex rel. Francis v. *Resweber* (329 U.S. 459, 462)	11, 13
Selvester v. *United States* (172 U.S. 262, 269)	9
Trono v. *United States* (199 U.S. 521, 533)	13, 14
United States v. *One Device, etc.* (160 F.2d 194, 220, CA-10)	10

Petitioner's Reply Brief

Point 1: petitioner (defendant) did not object to twice-requested revision of the forms of the verdicts, but, in effect, joined in the request when made the second time.

As a part of its "STATEMENT", appearing on page 7 of its Brief filed September 22, 1949, respondent erroneously says:

> "Petitioner's counsel objected to any revision of the forms (of the verdicts)[1] . . ."

As demonstrated hereinbelow, the fact is, that petitioner's counsel did *not* object to a revision of the forms of the verdicts.

Insofar as concerns the *multiple*[2] forms of each of the verdicts, petitioner's counsel took specific and timely exception immediately upon the completion of the trial judge's charge to the jury (R.p. 350, and see also Court of Appeals' Opinion at R.p. 455, lines 5 et seq).

Insofar as concerns the trial court's use of the words "label" instead of the word "labeling" in the typed verdict-forms[3], by reason of which the jury brought in

---

[1] all parenthetical interpolations within quotations and all emphasis within quotations, and all footnotes referenced to quotations, are supplied by petitioner's counsel, unless otherwise noted

[2] i. e. that aspect of the verdict-forms which required the jury to find defendant guilty or not guilty *more* than once on each count;—whereas the District Court in its pre-arraignment decision (R.pp. 8, 9) and the Court of Appeals in its Opinion (R.p. 451, lines 21 to 32) held that the counts were not multiple or duplicitous in character (namely, both courts held that the *charge* in each count was *single* and not duplicitous)

[3] Counsel for (defendant) petitioner were *not* given any opportunity to read the typed verdict-forms prior to the time that such typed verdict-forms were handed to the jury at the conclusion of the charge, nor prior to the discharge of the jury. On the other hand, the Government's attorney who (a week prior to the charging of the jury) had suggested to the Court the improper multiple form of the verdicts (R.pp. 275-276) had obtained copies of the typewritten verdict-forms at least as early as immediately after the jury retired with such verdict-forms (R.p. 353)

a verdict of "guilty" as to an offense *not* charged in the Information, petitioner's counsel did *not* "object to any revision of the forms (of the verdicts)" as *erroneously* suggested on page 7 of respondent's Brief because, as shown by the record (R.pp. 354-355), the *only* objection (on the part of petitioner's counsel) was to the recalling of the jury after it had been deliberating for some three hours, and such objection was solely on the ground that no one could tell how near the jury was to filling in the blank spaces in the verdict-form and signing the verdict, and no one could tell whether by such recalling the jury on the initiative of the Government's attorney or on the initiative of the Court may not have some implications (in the jury's mind) foreign to the issues (R.pp. 353-356).

The use of the word "label" in those parts of the verdict-forms on which the jury later made a "guilty" return[1], went unnoticed by defendant's (petitioner's) counsel[2] and assertedly *also by the Government's attorney*[2] during the oral reading (R.pp. 347, 349) of the verdict-forms to the jury and during the defendant's subsequent objections (R.p. 350) to the multiple character of the verdict-forms read.

The Government's attorney later (R.p. 353) gave credit to a Mr. Goding[3] for calling the attention of the Government's attorney to the distinction between "label" and "labeling" presumably during the course of or immediately after the judge's charge to the jury (and before the jury retired). The Government's attorney, in turn, then called the Court's attention to this distinction (R.p. 351) *before the typed verdict-forms were handed to the jury.* Defendant's counsel did *not* then object to this

---

[1] while making a "not guilty" return on other parts of the same verdict-forms *as to the same counts*

[2] and presumably was likewise *not* noticed by the trial judge even though he presumably gave his oral reading directly from his typed verdict-forms which were then handed to the jury directly upon the conclusion of the Court's charge

[3] *not* of counsel, but who came in to the courtroom toward the end of the trial and who was apparently connected with some Government department in Washington (R.p. 354)

distinction being made between "label" and "labeling" (R.p. 351). Yet, notwithstanding this, the Court did *not* change the verdict-forms, in this respect, although its attention was called to the matter before such verdict-forms were handed to the jury and before the jury retired and while the Court still had ample opportunity to change the verdict-forms before the jury retired.

After the jury had deliberated for about three hours, the Government's attorney again called this *same* matter to the Court's attention (in chambers). This time the Government's attorney suggested to the Court, however, that when he (the Government's attorney) had earlier called the same matter to the Court's attention before the jury retired (R.p. 351), he (the Government's attorney) didn't fully appreciate the significance of the matter as had been brought to his attention by Mr. Goding:

> **"When I mentioned* the matter of the label and the labeling at the conclusion of your charge*, I didn't have in mind the significance of it as it was brought to my attention by Mr. Goding;** and we had the reporter read back what was said to the jury with respect to these forms of verdict and we got copies of the forms which were placed with the jury. It appears (i. e. from a reading, by Messrs. Hansen and Goding, of their copies of the verdict-forms) that the one, for instance the Feltenberger, it should have read: 'To-wit, Powdr-X, with labeling', instead of 'with a label which was false and misleading.' And then further down, **Mr. Goding felt,** further down where . . . in the Evans matter there of course is only the question of whether the word 'label' or 'labeling' should be used, the suggestion being that it should have read, 'to-wit, Powdr-X, with labeling,' instead of 'a label' 'which was false or misleading,' instead of 'false and misleading.'
>
> THE COURT:—Did you read your information?
>
> MR. HANSEN:—I didn't prepare the information and I have not checked it with this.

*this has reference to Mr. Hanson's remarks on Record page 351

> THE COURT:—The information says false and misleading. I merely followed the language of your own information and **did so intentionally** because I felt I had no other alternative in the way you had framed your information" (R.p. 353).

Far from having "objected to any revision of the forms (of the verdicts)" as *erroneously* suggested on page 7 of respondent's Brief, petitioner's counsel, on the contrary, stated to the trial judge that if the jury, *on its own initiative,* came back for further instruction, *the requested change in the form of the verdicts would be in order* (R.p. 355, lines 29-32); petitioner's counsel thereby, in effect, joining the Government's attorney in this *second** request for a change, providing only that an opportunity presented itself for effecting such change without disturbing the jury in its deliberations (at the instance of either court or counsel). Such an opportunity did present itself as shown hereinbelow.

Thus, after being out for more than 23 hours, the jury did (on its own *initiative*) return to the Court for further instructions (R.p. 356) and the Court further addressed the jury (R.pp. 361, 363) but did *not* amend the forms of verdicts *nor* further instruct the jury concerning the forms of the verdicts (as the Court had theretofore been adequately requested to do (R.pp. 353-356).

Therefore, the statement on page 7 of respondent's brief that

> "Petitioner's counsel objected to any revision of the forms (of the verdicts)"

is not a fair reflection of the facts;—the facts being as above set forth and as can be seen from the parts of the record to which reference is made above. Moreover, the improper multiple character of the verdict-forms was clearly suggested to the Court (and requested by) the Government's attorney (R.pp. 275-276) 7 days before the jury was instructed.

* the first request (R.p. 351) having been made before the jury retired

On page 9 of its brief in opposition, respondent quotes from the District Court's opinion (R.p. 377) denying defendant's post-verdict motion (R.p. 364-369) for judgment of acquittal, wherein the District Court also erroneously stated that defendant had objected to any change in the forms of the verdicts, whereas, as shown above, defendant, if anything, approved such change in the form of verdicts if an opportunity therefor presented itself upon the jury's return for further instructions on its own initiative, which opportunity did present itself without the Court availing itself of such opportunity and without the Court making any such change in the form of the verdicts.

Moreover, the Court of Appeals, in its opinion (at R.pp. 457 to 460, and particularly on p. 460) reached a conclusion diametrically opposite to that reached by the District Court as expressed, inter alia, in that part of the District Court's opinion which is quoted on page 9 of the respondent's brief in opposition to petition for writ of certiorari;—the Court of Appeals expressly reversing the District Court on the matter so quoted on page 9 of respondent's brief (see also appellate opinion at R.pp. 459-460).

Point 2: Jury's verdicts

a) were silent in respect to charge of misbranding by marking false and misleading representations in the "labeling" (i. e. in the letters) as charged in Counts I & III of the Information, and

b) did find petitioner guilty of an offense not charged, namely, the jury's verdicts found petitioner guilty of such "misbranding" in the "label", and such "misbranding" in the "label" was not charged in any Count of the Information.

On pages 14 and 15 of respondent's brief in opposition to petition for writ of certiorari, respondent *erroneously* states:

> "In the instant case, the jury's verdict was not silent in respect of the charge of misbranding by making false and misleading representations in the labeling, nor did the jury find petitioner guilty of an offense not charged."

However, this is likewise contrary to the fact because, as the Court of Appeals correctly held (R.pp. 459-460), in the instant case the jury's verdict *was silent* in respect of the charge of misbranding by making false and misleading representations in the *labeling,* namely in the letters which were only things charged in the Information to contain any false and misleading representations;—the *label,* found by the jury to have contained false and misleading representations, was *not* charged in the Information to contain *any* false and misleading representations.

The jury therefor did find the defendant guilty of an offense *not* charged, as the Court of Appeals correctly found (R.p. 459).

Point 3: The misleading affidavit by the Government's attorney, filed with the Government's Petition for Re-Hearing in the Court of Appeals, as to facts dehors the record and contrary to the record, must be presumed to have influenced the Court of Appeals to change its judgment from "discharge the accused" to "grant a new trial", in the absence of any statement to the contrary by the Court of Appeals.

In the extensive footnote on page 16 of its Brief in opposition to the petition for writ of certiorari, respondent presumably in response to *Question 3** on page 10 of the petition and *Argument-Point 2** on pages 26 to 32 of petitioner's Brief, unwarrantedly suggests that the Court of Appeals was not influenced by the factually misleading affidavit (R.pp. 487-488) of the Government's attorney accompanying Government's petition for rehearing in the Court of Appeals (see the affidavit of defendant's attorney at R.pp. 504-507 on defendant's Petition for Rehearing at R.pp. 491-503).

* not otherwise answered in respondent's brief

Petitioner's counsel respectfully submits that in the absence of any statement to the contrary by the Court of Appeals, it must be presumed that the Court of Appeals *was* influenced by the misleading affidavit of the Government's attorney;—because the fact is that while (*in form*) denying the Government's petition for rehearing, the Court of Appeals gave the Government substantially the relief which the Government asked for on its petition for rehearing and, in so doing, the Court of Appeals not only made serious errors of law, as pointed out in the Petition for Writ of Certiorari and in the Brief in support thereof, but the Court of Appeals thereby also created an irreconcilable conflict between its unaltered opinion and conclusions (R.pp. 448-460) of April 18, 1949 and the *end-result* directed by its subsequent modifying order (R.p. 489) of June 6, 1949, namely, the plain language of its opinion and conclusions (R. pp. 448-460) and the authorities correctly relied upon by the Court of Appeals, *required* a discharge of the defendant, which its *original* opinion (R.pp. 448-460) and judgment (R.p. 460) granted, whereas its modifying order (R.p. 489) withdraws such theretofore correctly directed *discharge* and, instead, erroneously subjects defendant to a new trial and hence to double jeopardy in respect to counts on each of which the jury made one or two *"not guilty"* returns and in respect to which the jury did *not* render *any* verdict of "guilty" (of any offense charged in the count), as pointed out in the unaltered opinion of the Court of Appeals (R.p. 459, last 4 lines, and R.p. 460, first 2 lines).

Point 4: Authorities relied upon in respondent's Brief in opposition to the Petition for Writ of Certiorari, do not support respondent's contentions in opposition to the Petition.

Point 4-a: Special verdicts not permissible in criminal cases (and the Court of Appeals correctly held that special verdicts are not permissible in criminal cases).

On page 11 of its opposing Brief, respondent erroneously suggests that "this court has approved the use of

special verdicts in treason cases" and in support of such erroneous statement respondent cites this Court's decisions in *Haupt* v. *United States* (330 U.S. 631, 641) and *Cramer* v. *United States* (325 U.S. 1, 36).

However, in neither the *Haupt* case nor in the *Cramer* case was there any special verdict. On the contrary, in each of these two cases there was nothing but a general verdict.

The only statement which this Court made in respect to a special verdict was in the footnote in the *Haupt* case at 330 U.S. 641, wherein this Court said

> "If acts were pleaded in separate counts, or a special verdict were required as to each overt act of a single count, the conviction could be sustained on a single well-proved act. As the acts were here pleaded in a single count, and the jury were instructed that they could convict* on any one, we would have to reverse if any act were insufficient or insufficiently proved." (330 U.S. 641)

It is perfectly clear that this Court's reference to the alternative possibility "**If** . . . a special verdict were required as to each overt act of a single count", was dictum, because no such special verdict was involved in the *Haupt* case nor in the earlier *Cramer* case to which this Court's aforesaid footnote refers.

So far, the Government's attorneys have been unable to cite a *single* case in which a special verdict in a criminal case was in fact approved. On the contrary, however, it is the well-established rule that special verdicts are not authorized in criminal cases, in the Federal Courts (*Anderson* v. *United States,* 275 F. 677; CA-7).

Point 4-b: *Haupt* v. *U. S.* and *Cramer* v. *U. S.*, relied upon by respondent, support petitioner's position on the petition at bar.

Furthermore, *Haupt* v. *United States* and *Cramer* v. *United States,* supra, relied upon by respondent on page

* on a general verdict

11 of its Brief in opposition, far from supporting respondent's position, indeed, support petitioner's position that it was entitled to a discharge (as the original decision and judgment of the Court of Appeals at first correctly directed) because, as pointed out in the *Haupt* case and the *Cramer* case, if several overt acts, offenses or violations are charged in one Count, and any one of such overt acts, offenses or violations are either insufficient or not sufficiently proved, a guilty verdict on such count cannot be sustained even though the other overt acts, offenses or violations included within the same count were sufficient and were adequately proved.

In the case at bar it would therefore be impossible to re-try petitioner on Counts I & III (here involved) because as to each of these Counts the jury made a "not guilty" return as to one or two of the offenses or violations included in the Count and was silent as to the other offense or violation included in the Count, and such silence is equivalent to acquittal under this Court's decisions in *Selvester* v. *United States* (172 U.S. 262, 269) and *Dealy* v. *United States* (152 U.S. 539, 542). Hence, even if the law were not as this Court has expressly held in the *Dealy* case and the *Selvester* case and if this Court should expressly overrule the *Dealy* case and the *Selvester* case, so as to authorize a new trial in respect to the offense or violation in Counts I & III as to which the jury's verdict was silent, it would *not* be possible to re-try petitioner under Counts I & III because, as pointed out by this Court in the *Cramer* and *Haupt* cases, supra, it would not be possible to know whether the jury's general verdict* on either Count I or Count III was or was not based upon the acts, offenses or violations included in these Counts as to which the defendant (petitioner) had been found *not guilty* on the first trial, and as to which acts, offenses or violations defendant certainly could not be re-tried in

* the only kind of verdict which the Court of Appeals, in the case at bar (and other Federal courts) have uniformly and correctly held to be the only form of verdict permissible in a criminal case

the face of the *"not guilty"* verdicts returned on the first trial.

Here again, respondent's Brief disagrees with the opinion of the Court of Appeals in the case at bar (see last two lines on page 11 and first line on page 12 of respondent's Brief).

Point 4-c: A judgment of conviction could not be sustained on a general verdict of "guilty", where the count charged several distinct overt acts or violations and one of such acts or violations is not established.

The case of *United States* v. *One Device, etc.,* 160 F. 2d 194, 200 (CA-10) does not support respondent's contention for which it is cited, namely that a charge of misbranding of the Count is established if the evidence proves that any *one* of the *several* statutorily distinct kinds of misbranding charged in such Count is established. Thus, the case of *United States* v. *One Device, etc.* was a libel action aimed solely at the seizure and condemnation of two certain devices and was tried to the Court without a jury, and the Court, as is proper in such cases tried without a jury, made special findings of fact and conclusions of law. However, the case of *United States* v. *One Device, etc.* does not support the proposition that a single Count for misbranding is sustained in the evidence proves any *one* of the *several* statutorily separate and distinct kinds of misbranding included in the one Count (tried to a jury) without proving all acts or violations included in such Count.

Moreover, if the case of *United States* v. *One Device, etc.* had held that a single Count of misbranding is sustained if the evidence proves any *one* of the *several* statutorily separate and distinct kinds misbranding included in the Count, then such decision would have been clearly in conflict with this Court's decisions in *Haupt* v. *United States* and *Cramer* v. *United States,* supra.

Point 4-d: Constitutional protection against being twice put in jeopardy is not waived by defendant's appeal solely for acquittal or discharge (from a judgment of conviction and from the trial court's decision denying defendant's sole post-verdict motion for judgment of acquittal).

Neither the case of *Ball* v. *United States* (163 U. S. 662, 672) nor the case of *Louisiana ex rel. Francis* v. *Resweber* (329 U.S. 459, 462) cited on page 12 of respondent's Brief in opposition, supports respondent's contention for which it is cited, namely that petitioner has waived his constitutional protection against being twice put in jeopardy.

In *Ball* v. *United States,* three defendants (Millard F. Ball, John C. Ball and Robert E. Boutwell) were tried together upon an indictment against them. The jury returned a verdict of "guilty, as charged in this indictment" against John C. Ball and Robert E. Boutwell, and found Millard F. Ball "not guilty". After sentence, John C. Ball and Robert E. Boutwell *appealed* and prayed "that the judgment be reversed and the cause remanded *for a new trial*", because of a fatal defect or deficiency in the indictment, for which reason they contended that "there was no legal indictment". This Court, upon writ of error, reversed the judgment against John C. Ball and Robert E. Boutwell because the indictment was fatally defective and

> "remanded the cause with directions to quash the indictment and to take such further proceedings in relation to them (i.e. John C. Ball and Robert E. Boutwell) as to justice might appertain. Ball *v.* U.S., 140 U.S. 118, 136 and 35 L.Ed. 377, 385".

Thereupon the trial court dismissed the indictment and the grand jury returned a new and sufficient indictment against *all three* defendants. Millard F. Ball thereupon filed a plea of former jeopardy and former acquittal and for an order of the trial court for his discharge upon the former indictment. The defendants John C. Ball and Robert E. Boutwell filed a plea of former jeopardy by reason of their trial and conviction upon their former

indictment and the dismissal of that indictment. The trial court overruled both these pleas, whereupon all three defendants then severally pleaded "not guilty". The defendants introduced in evidence the record of the proceedings upon the former indictment and the trial judge instructed the jury to find against both pleas of former jeopardy, because the trial court decided that the former indictment was insufficient; whereupon the second jury returned a verdict of "guilty" against all three defendants and the court imposed sentence upon all three defendants.

This Court, in *Ball* v. *U. S.*, 163 U.S. 662 *reversed* the lower court's decision *as to Millard F. Ball* and held that his former acquittal *did* constitute "former jeopardy" in relation to the second indictment and second trial, notwithstanding the fact that the first indictment was fatally deficient and insufficient to support any verdict or judgment against defendants;—Millard F. Ball not having appealed from the first judgment nor asked for new trial.

Therefore, this Court's statement in *Ball* v. *United States* 163 U.S. 662, 672, relied upon by respondent, related *solely* to the defendants John C. Ball and Robert E. Boutwell who had, on their first appeal, from the first judgment prayed "that the judgment be reversed and the cause remanded *for a new trial*".

Of course, it goes without saying that a defendant who appeals *for a new trial*, and then gets a new trial, cannot plead "former jeopardy".

In the case at bar, defendant did *not* ask for a new trial. On the contrary, on page 16 of petitioner's brief filed in the Court of Appeals on December 24, 1948, under the heading of "relief prayed for", petitioner said:

> "On this appeal, appellant prays for reversal of the judgment of the lower court as to Counts I and III of the Information; and that appellant be granted judgment of acquittal, or that the action be dismissed in accordance with appellant's motion filed December 18, 1947 (R.pp. 6, 7), and that he be discharged" (R.p. 499).

and petitioner's brief in the Court of Appeals, on page 51, under the heading of "Conclusion", stated:

> "For the reasons above stated, it is respectfully submitted that the judgment of the lower court should be reversed; that the defendant is entitled to judgment of acquittal or to have the action dismissed in accordance with his motion for dismissal which was denied by the lower court and, in either event, that the defendant is entitled to be discharged.
>
> "In taking this appeal, the defendant does not waive and expressly reserves the right to not again be tried or put in jeopardy on or for any of the charges on which he was once tried and found 'not guilty' by the jury or on which the verdicts of the jury were silent" (R.p. 499).

In the case of *Louisiana, ex rel. Francis* v. *Resweber* (329 U.S. 459, 462) the only question involved was whether the state's failure to carry out the death sentence upon the date legally fixed therefor, because of some defect in the state's execution equipment or machinery, barred the state from carrying out its sentence at a later date, on the theory of "former jeopardy" or "double jeopardy". There is clearly no such situation or any analogous situation in the case at bar.

The case of *Trono* v. *United States* (199 U.S. 521, 533) which was *not* cited in the Government's briefs in the Court of Appeals either on the original hearing or on its petition for rehearing (notwithstanding its argument on the question of waiver of constitutional protection against double jeopardy), likewise does not support respondent's contention,* for which that case is now cited for the first time, namely, that petitioner has waived the constitutional protection against double jeopardy by taking an appeal.

While this Court's opinion in *Trono* v. *United States* does not say, in so many words, that the defendant Trono

* rejected by the Court of Appeals in the case at bar at R.pp. 459-460

appealed for a new trial, this is what undoubtedly must have happened. At least, in the absence of any indication that defendant's appeal in the *Trono* case was not for the purpose of obtaining a new trial, it cannot be assumed that it was not for the purpose of getting a new trial that Trono took the appeal, and it is only upon that assumption that the *Trono* case could in any way support respondent's contention of waiver of the constitutional protection against double jeopardy.

Moreover, in the *Trono* case, defendant *had been found guilty of an offense charged,* whereas in the case at bar *petitioner has not been found guilty of any offense charged* (R.p. 460), and in the *Trono* case it was a matter of the *varying degrees* of the *same* offense, whereas in the case at bar each Count contained several separate and distinct violations which were *not* merely *varying degrees* of the same offense but were, indeed, under different sections of the statute, and, furthermore, in the case at bar, *all parts of the verdicts* (on each Count) which referred to an offense or violation actually charged in the information, were verdicts of *"not guilty"*.

Point 5: Respondent's opposition to the granting of the Petition for Writ of Certiorari is based upon respondent's reliance upon the overruled and reversed decision (R.pp. 372-380) of the District Court which denied defendant's post-verdict motion (R.pp. 364-369) for judgment of acquittal, and is further based upon respondent's disagreement with and criticism of every conclusion of law reached by the Court of Appeals in its reversing decision (R.pp. 448-460).

It will thus be seen that in addition respondent's *errors of fact* covered by foregoing *Points 1 and 2* and respondent's misapplication of authorities covered by foregoing *Points 4-a, 4-b, 4-c and 4-d,* respondent's opposition to the petition, at bar, for writ of certiorari, is based primarily (1) upon respondent's disagreement* with all

* see the following parts of respondent's Brief: from page 10, line 17 to page 11, line 6; from page 11, line 30 to page 12, line 1; from page 14, line 22 to page 15, line 30

the underlying conclusions in the decision of the Court of Appeals and (2) upon respondent's reliance* upon the decision of the District Court denying petitioner's post-verdict motion for judgment of acquittal, which decision of the District Court was *reversed.*

Thus, it now also appears from respondent's brief in opposition to the petition for writ of certiorari that the opinion of the Court of Appeals is irreconcilably in conflict with its *subsequent* modifying order directing a new trial, and that only a discharge of the accused (as first correctly directed by the Court of Appeals) can be in harmony with the otherwise correct reversing opinion of the Court of Appeals.

Hence, respondent's own brief in opposition, (1) in finding support *only* in the *reversed* decision of the District Court and (2) in finding *no* support whatever in the reversing decision of the Court of Appeals, also indicates that the petition in the case at bar is one which should be granted.

As pointed out in the Opinion of the Court of Appeals on pages 459-460 of the Record:

> "It is also argued (by the Government's attorney) that the appellant should be deemed to have waived the defects in the forms of verdict because he did not point them out to the court at the time the court delivered them to the jury. But the record shows that the court's attention was called to the defects both before the forms went to the jury and afterwards before the verdicts were arrived at. The court stated, 'The jury can't possibly be misled by the form of verdict in so far as the term "'label" is concerned.' 'I can't conceive that there is anything but a rather captious objection to the word "label" as I used it in the verdict.' As this court's study of the record has led to contrary conclusions and to holding that in consequence of the defects in the forms it

* see the following parts of respondent's Brief: page 7, lines 14-31; page 8, lines 16-31, and page 9, lines 1 to 20; page 11, lines 3-6; page 15, lines 3-26

has resulted that there was no verdict of guilty of false labeling within the charge of the information, the onus of the outcome may not be shifted to the appellant. He was put in jeopardy on the charges of the several counts of the information and the jury was discharged without having rendered verdicts of guilty responding to the charges and he is therefore entitled to have the judgment against him avoided.

Reversed and remanded with direction to set aside the judgment and discharge the accused."*

Conclusion.

Therefore it is respectfully submitted that the petition at bar should be granted.

C. A. TANEY, JR.,
G. AARON YOUNGQUIST,
LEONARD L. KALISH,
attorneys for petitioner.

* the words "discharge the accused" appeared in the Court's original opinion and in its original judgment of April 18, 1948 and were replaced by the words "grant a new trial" a month and a half later, responsive upon the Government's petition (R.pp. 461-486) for rehearing and the affidavit of the Government's attorney (R.pp. 487-488)